LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 14 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1067

WALTER D. TEAGUE III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY WINESTINE
430 Park Avenue
New York, N. Y. 10022
Attorney for Petitioners

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y.

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y.

Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations	3
Statement of the Case	3
Reasons for Granting Writ	6
Appendices:	
A. Opinion of the Court of Appeals	1a
Opinions of the District Court	12a
B. Judgments Sought to Be Reviewed	23a
C. Statute and Regulations	27a

CITATIONS

Cases:

Afroyim v. Rusk, 387 U.S. 253 (1967)	8
Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965)	5
Binks Manufacturing Co. v. Ransberg Electro-Coating Corp., 281 F.2d 252 (7th Cir. 1960)	5
Carroll v. Princess Anne, —— U.S. ——, 89 S.Ct. 347 (1968)	13
Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)	11

PAGE

Freedman v. Maryland, 380 U.S. 51 (1965) 13

Grosjean v. American Press Co., 297 U.S. 233 (1936) 16

Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. 1965) 14

Kent v. Dulles, 357 U.S. 116 (1958) 6, 12

Lamont v. Postmaster General, 229 F.Supp. 913 (S.D.N.Y. 1965) 14, 15

Lamont v. Postmaster General, 381 U.S. 301 (1965) ..8, 13

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 10, 15

Niemotko v. Maryland, 340 U.S. 268 (1951) 12

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 12

Perez v. Brownell, 356 U.S. 44 (1958) 7, 8

Ryan v. United States Lines Company, 303 F.2d 430 (2d Cir. 1962) 5

Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966), *cert. denied,* 385 U.S. 898 .....8, 11

Schneider v. Smith, 390 U.S. 17 (1968) 6

Sherbert v. Verner, 374 U.S. 398 (1963) 10

Smith v. Polin, 90 U.S. App. D.C. 178, 194 F.2d 349 (D.C. Cir. 1952) 5

Speiser v. Randall, 357 U.S. 513 (1958) 15

Talley v. California, 362 U.S. 60 (1960) 15

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) .. 13

Thomas v. Collins, 323 U.S. 516 (1945) 16

United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 7

United States v. O'Brien, 391 U.S. 367 (1968) ..6, 7, 9, 10

United States v. Robel, 389 U.S. 258 (1967) 6, 8

United States v. Rumeley, 345 U.S. 41 (1953) 6

PAGE

United States v. von Clemm, 136 F.2d 968 (2d Cir. 1943), *cert. denied*, 320 U.S. 769 11

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 8

Zwickler v. Koota, 389 U.S. 241 (1967) 15

Zwickler v. Koota, 290 F.Supp. 244 (E.D.N.Y. 1968), *prob. juris. noted*, 393 U.S. 818 15

Statutes and Regulations:

12 U.S.C. § 95a 11

18 U.S.C. § 1001 15

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 4

28 U.S.C. § 1337 4

28 U.S.C. § 1356 4

50 U.S.C. App. § 5(b) 2, 3, 4, 11

64 Stat. A454 11

Foreign Assets Control Regulations, 31 C.F.R. Part 500 ..... 2, 3, 4

§ 500.201 (a) 10, 15

§ 500.204 Appendix item (108) 4, 12, 17

§ 500.503 13

33 Fed. Reg. 47 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

WALTER D. TEAGUE III, CHARLOTTE POLIN, UNITED STATES COMMITTEE TO AID THE NATIONAL LIBERATION FRONT OF SOUTH VIETNAM, LIBERATION, FIFTH AVENUE VIETNAM PEACE PARADE COMMITTEE, and FREE SCHOOL OF NEW YORK, INC.,

Petitioners,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners above mentioned respectfully pray that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Second Circuit entered herein on November 14, 1968.

Opinions Below

The opinions of the district court and the court of appeals have not been reported. The opinion of the court of appeals is printed below at page 1a. The two opinions of the district court are printed below at pages 12a and 19a.

Jurisdiction

The two judgments sought to be reviewed were entered November 14, 1968. The jurisdiction of this Court to review the judgments below is conferred by 28 U.S.C. §1254(1).

Questions Presented

1. Whether 50 U.S.C. App. §5(b), which permits the President or his delegate, during a period of "national emergency", to prohibit or regulate transactions involving any foreign country or its nationals, is unconstitutional as delegating legislative power without adequate standards, and invalid for overbreadth?

2. Whether the Foreign Assets Control Regulations, 31 C.F.R. Part 500, are unconstitutional for overbreadth in granting, with no standard for its exercise, power to an administrative official to issue or deny licenses to receive publications from China, North Korea and North Vietnam?

3. Whether the Foreign Assets Control Regulations, on their face and as applied, violate the First Amendment by prohibiting the receipt in the United States of unsolicited publications from China, North Korea and North Vietnam unless the addressee

(a) undertakes the burden and suffers the delay of obtaining a license;

(b) submits for a permanent public record his desire to receive publications from the proscribed countries; and

(c) assumes the burden of proving that he has made no payment?

4. Whether the Foreign Assets Control Regulations violate the First Amendment by prohibiting payment for publications originating in China, North Korea and North Vietnam?

Statute and Regulations

This case involves 50 U.S.C. App. §5(b) and the Foreign Assets Control Regulations, 31 C.F.R. Part 500. Pertinent portions of the Statute and Regulations are set forth in the Appendix, *infra*, at page 27a.

Statement of the Case

Petitioners are the addressees of mailed shipments of publications containing factual information and political opinion, and originating in North Vietnam and mainland China (R. 3, 5, 6, 7, 8, 162). The shipments of publications to three of petitioners, Liberation, Fifth Avenue Vietnam Peace Parade Committee, and Free School of New York, Inc., were occasional and unsolicited (R. 29, 31, 33). The shipments to petitioners United States Committee to Aid the National Liberation Front of South Vietnam (hereinafter "Aid Committee") and Teague, who is chairman of Aid Committee, were pursuant to requests and consisted of substantial quantities of publications which were sold or otherwise distributed to public and institutional libraries and to the public generally (R. 24-25).

Commencing in November, 1966, the Regional Commissioner of Customs detained such shipments and with re-

spect to each detention sent a notice to petitioners stating that the materials would not be released unless a license were obtained from Foreign Assets Control (R. 39, 46-49), an office in the Treasury Department which administers the Foreign Assets Control Regulations, 31 C.F.R. Part 500 (hereinafter "the Regulations"). Although printed forms for application for such licenses were enclosed with the notices (R. 44), neither the notice nor the printed forms stated on what basis, if any, licenses would be issued.

Without applying for licenses, petitioners commenced this action seeking a declaration that the Regulations and 50 U.S.C. App. §5(b) (hereinafter "the Statute"), which purportedly provided authority for the Regulations, were unconstitutional, and an injunction against their enforcement. Jurisdiction of the district court was based upon 28 U.S.C. §§1331, 1337 and 1356.

While the action was pending, petitioner Polin applied for licenses for publications addressed to her (R. 35). She received no response for four weeks, and that response was not a license, but a request for proof that the publications were gifts (R. 37).

Petitioners moved for summary judgment, or alternatively for a preliminary injunction, and for the convening of a three-judge court. At the time the motion for summary judgment was argued the Secretary of the Treasury amended §500.204 Appendix item (108) of the Regulations by adding a provision that publications and films from China, North Korea and North Vietnam "are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers."

The district court granted summary judgment to respondents.

After the entry of judgment, petitioner Teague, on behalf of himself and Aid Committee, filed an application for a license for all but a few of the publications addressed to them (R. 261). He had submitted an affidavit on the motion for summary judgment swearing that he had never made payment for publications shipped to him (R. 25). He repeated this assertion in the license application (R. 262, 264). Five weeks after the application was filed Mr. Teague received a letter requesting that he answer a full page of minutely detailed interrogatories, including a question requiring him to list all importations of publications for the past three years (R. 269-270).

This response was the first knowledge received by petitioners regarding the burdensome manner in which the Regulations are actually administered. They moved in the district court to vacate the judgment on the ground of newly discovered evidence.[1] The motion was denied.

On consolidated appeals from the judgment and from the order denying the motion to vacate the judgment, the court of appeals affirmed.

---

[1] Although a notice of appeal had been filed, this procedure was followed on the authority of *Ryan* v. *United States Lines Company*, 303 F.2d 430 (2d Cir. 1962); *Smith* v. *Pollin*, 90 U.S. App. D.C. 178, 194 F.2d 349, 350 (D.C.Cir. 1952); *Binks Manufacturing Co.* v. *Ransburg Electro-Coating Corp.*, 281 F.2d 252, 260 (7th Cir. 1960); *Aune* v. *Reynders*, 344 F.2d 835, 841 (10th Cir. 1965).

Reasons for Granting the Writ

1. *The Regulations Are Not Valid as an "Incidental" Infringement of Free Speech.*

The court below declined to consider the petitioners' First Amendment arguments that the Regulations are overly broad in their grant of discretion to the administrator, that the licensing procedure is burdensome and time-consuming, that applicants must forego their right to anonymity and assume the burden of proof in the proceeding. Instead, the court mechanically followed *United States* v. *O'Brien,* 391 U.S. 367 (1968), and found that "the infringement of first amendment freedom is permissible as incidental to the proper, important, and substantial general purpose of the regulations."

Several facets of *O'Brien* demand clarification lest that case become the source of a new and harshly restrictive First Amendment doctrine. The opinion in *O'Brien* suggests that its scope was intended to be limited to "symbolic speech", in which the non-communicative elements are subject to governmental regulation, 391 U.S. at 376. If long established freedoms are to be maintained, *O'Brien* should, at a minimum, be expressly so limited.

O'Brien is an inappropriate authority for this case for a further reason. This Court has traditionally and deliberately avoided constitutional issues, where possible, by construing statutes in a manner to conform with constitutional requirements, see, e.g., *United States* v. *Rumely,* 345 U.S. 41 (1953); *Kent* v. *Dulles,* 357 U.S. 116 (1958); *Schneider* v. *Smith,* 390 U.S. 17 (1968); and cf. *United States* v. *Robel,* 389 U.S. 258, 262 (1967), holding the statute there in issue to be so precisely drawn that a construction on

constitutional grounds was unavoidable. *O'Brien,* like *Robel,* dealt with a clear and precise statute. The instant case, on the contrary, involves a broadly worded statute whose sole purpose is to regulate the flow of dollars or other economic benefits to the proscribed countries. To the extent that the Regulations sweep unsolicited publications into the licensing scheme, they are not incidental to the underlying purpose, but are foreign to it. The decision of the court below thus rejected an established rule of constitutional construction, and did so in a manner which upheld the statute without even inquiring into its effect on speech.

If, however, *O'Brien* is deemed to state the doctrine applicable to this case, then its full import deserves close scrutiny.

In the crucial passage in *O'Brien,* the Chief Justice, noting the inherent imprecision in the language used, stated, 391 U.S. at 377:

> "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

This seemingly simple statement raises a host of questions. The first is whether the Statute and Regulations are within a constitutional power. The notion of an inherent "foreign relations power", see, e.g., *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), and *Perez* v.

Brownell, 356 U.S. 44 (1958), has lost much, if not all, its authority in the overruling of *Perez* by *Afroyim* v. *Rusk,* 387 U.S. 253 (1967). The war power certainly is no source of power until war is declared, cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), and even then is no authority for undermining fundamental liberties, *United States* v. *Robel, supra* at 263-264. The only conceivable basis for the Regulations is the commerce power. Broad as it is, the power to regulate commerce certainly does not stand higher than the First Amendment in our constitutional system.

A second question relates to the importance of the governmental interest. Any limitation on free speech, even a bald censorship measure, can readily be expressed as incidental to a program effecting nonspeech purposes. Moreover, the mere fact of enactment indicates that the enacting authority deems a statute or regulation to have a substantial governmental interest. It is hardly a proper task for the courts to sit in judgment of a legislature and determine one statute to be trivial, another vital. The court below distinguished *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), because the Solicitor General in that case had conceded that the governmental interest was not compelling, 381 U.S. 309. But *Lamont* involved a statute duly enacted by Congress after extensive committee hearings and full deliberation. The regulations here in issue are the work of the Secretary of the Treasury, issued without notice or debate. It is a dubious proposition that a cabinet member's unilateral fiat evidences a more pressing national interest than an act of Congress.

The court of appeals, following its earlier decision in *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106, 112 (2d Cir. 1966), *cert. denied,* 385 U.S. 898, held that "hard cur-

rency is a weapon in the struggle between the free and communist worlds" so that "the Regulations contribute to the furtherance of a vital interest of the government." Whether great national interests would suffer if trade with the proscribed countries were permitted is, of course, a question of political judgment. It is enough to point out that trade with the largest portion of the communist world is unrestricted. The Regulations themselves permit libraries and learned institutions to purchase publications, 31 C.F.R. §500.204 appendix item (108). Thus the government acknowledges that an absolute prohibition of commerce is not required. Can it then be said that the government interest in prohibiting commerce is so great that even unsolicited publications must be licensed?

Another question relates to the nature of the First Amendment right at stake. The right sought to be exercised by petitioners is at once the most important and the least offensive: the right passively to receive informative publications. It is the ultimate right of the citizen to inform himself. In contrast to the protester in *O'Brien,* see Mr. Justice Harlan's concurring opinion, 391 U.S. at 388, there is no alternative manner by which petitioners may achieve the same ends.[2]

A final question in terms of *O'Brien* is whether the Regulations impose restrictions "greater than is essential." The administrative procedure, as discussed below, is unreasonably burdensome and time-consuming. More important, it is totally unnecessary. The government

---

[2] The statement by the court of appeals that the publications "are available at 'universities, libraries, [and] research and scientific institutions,' 31 C.F.R. §500, 204 App. ¶108", is without support. That such institutions may procure the publications obviously does not mean they will.

argued in the courts below that its only concern is to prevent the transmission of money to the proscribed countries. The Regulations, 31 C.F.R. §500.201(a), expressly prohibit such payments, and a violation of the Regulations is a felony. Surely criminal sanctions are a sufficient deterrent to making payment, as they are deemed to be with a vast array of far more serious anti-social behavior, without imposing a licensing requirement as well.

The burden of establishing that the Regulations are improper, or that adequate alternatives are available, is not petitioners'. Where First Amendment rights are violated, the government must justify the infringement, *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 466 (1958); *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963).

Unless *O'Brien* offers the government a short cut through the barriers of the First Amendment, the Regulations must be judged by accepted standards. When so measured they clearly fail the constitutional test.

2. *The Statute Delegates Legislative Power Without Adequate Standards.*

The Statute grants to the President or his designee, in time of war or national emergency, power to regulate or prohibit transactions involving property in which "any foreign country or a national thereof" is interested. This vast regulatory power is limited by no standard. The lack of standards is apparent from the variety of unrelated uses to which the Statute has been put. As originally enacted in World War I it was a wartime measure to prohibit trade with the Central Powers (thus its name, The Trading with the Enemy Act). During the depression, with the addition of the words "or any other period of

national emergency", the Statute supported a number of economic measures during the financial crisis of 1933. On the eve of World War II, it was used to freeze the property, not of the soon-to-be enemy, but of the nations overrun by the Nazis. (See *United States* v. *von Clemm,* 136 F.2d 968 (2d Cir. 1943), *cert. denied,* 320 U.S. 769, a criminal prosecution for trading in Dutch diamonds at a time when trade with Germany was unrestricted.) Most recently the Statute was deemed authority for restricting foreign investment to ease the pressure of adverse balance of payments, 33 Fed. Reg. 47. The catch-all nature of the Statute is emphasized in its codification not only as §5(b) of the Appendix to title 50 U.S.C., but also as §95a of title 12 U.S.C.

Some curb on the breadth of the delegated power would appear to be present in its limitation to "time of war or during any other period of national emergency declared by the President". Despite the holding of *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543 (1924), to the contrary, the court below reaffirmed the statement in *Sardino* v. *Federal Reserve Bank, supra,* 361 F.2d 106, 109, that "the courts will not review a determination" of the President that an emergency exists. It went on to state, however, that "there can hardly be doubt as to the existence of an emergency today," and noted that the emergency declared by President Truman in December, 1950 (64 Stat. A454), has never been revoked.

Certainly we live in troubled times, but troubled times do not constitute an emergency. There is no authority suggesting that "emergency" is a term of art. The word has a precise meaning: "a sudden, generally unexpected occurrence or set of circumstances demanding immediate

action", Webster's New World Dictionary. What may have been an emergency in 1950 can hardly remain such almost two decades later. If, as the court below stated, an emergency is no more than what the President declares by proclamation, the overbreadth and lack of standards is surely beyond constitutional sanction.

The delegated power may be exercised with respect to any country toward which the interest of the Executive may be directed, and the extent of regulation, or exemption from it, is left to the unfettered discretion of administrative officials. Its use is not even restricted to nations toward which there is an official animosity, for it has been used to freeze the assets of friendly nations, and to restrict foreign investment in general.

Such unlimited delegation of legislative power is constitutionally impermissible. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935). Where fundamental rights are affected, a narrow construction must be given to delegated powers, *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958); *Niemotko* v. *Maryland*, 340 U.S. 268, 271-272 (1951).

3. *The Regulations Violate the First Amendment.*

(a) *Overbreadth.* The Regulations prohibit every conceivable transaction involving in any way the three proscribed countries, China, North Korea and North Vietnam, unless licensed by Foreign Assets Control, a fourth echelon office in the Treasury Department. There is no standard set forth by which Foreign Assets Control is to be guided in granting licenses. The discretion of the administrator is completely unrestricted. In response to the motion for summary judgment in this action, the Regulations were amended by adding a sentence to 31 C.F.R. §500.204 Ap-

pendix item (108). The new sentence provides that films and publications will be licensed if the administrator is satisfied that they are bona fide gifts. This apparent standard, however, is subject to the reservation by the Secretary of the Treasury to exclude particular persons or transactions from the operation of any license, 31 C.F.R. §500.503. And it does not purport to be the only basis on which licenses will be granted.

(b) *Burden and delay.* Even if adequate standards were provided, the mere requirement that a license be obtained as a condition to exercising a First Amendment right renders the Regulations unconstitutional. In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), it was held that the minor burden of returning a postcard was an impermissible burden upon rights identical to those asserted in this case: the right to receive unsolicited publications from China. Here a formal application must be prepared in duplicate and submitted.[3] The mere requirement of applying for a license is likely to be a total deterrent to the addressee of unsolicited material. After the application is filed the addressee must then await the grinding of the administrative process. The government asserted below that licenses would normally be granted in about ten days. But ten days is too long to wait for an administrator to pass upon First Amendment rights, *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968); *Carroll* v. *Princess Anne,* —— U.S. ——, 89 S.Ct. 347 (1968).

---

[3] The burden is compounded by the fact that neither the notice of detention nor the printed application forms indicate that publications presumably will be licensed upon proof that they are gifts. The applicant unfamiliar with the Regulations can only guess at what information to submit.

The government's assertion that ten days is the normal processing period, however, is not borne out by the record. Miss Polin's application was not acted upon for four weeks, and the response was not a license, but a demand for information establishing that the material sent to her was a gift. The government justified that delay as resulting from the pendency of this litigation, and the courts below accepted that explanation. The only other application in the record is that of Mr. Teague, who submitted his after judgment had been entered in the district court. As a party to the action, he was aware that the concern of Foreign Assets Control purported to be whether payment was involved, and his application emphatically stated that no payment was being made. Yet he waited five weeks for a response and then received a demand that he answer a set of detailed interrogatories. Both the district court and the court of appeals found this inordinate delay also to be the result of the pending litigation. Neither court explained why the pendency of an action, after judgment and before appeal, should affect the speed of the administrative process.

(c) *Loss of anonymity.* The filing of an application for a license results in a permanent public record indicating the applicant's desire to receive publications from what the government described in its brief in the court below as "the enemy". The mere existence of such a record and its potential for being utilized by investigative agencies and congressional committees may be a forbidding deterrent to the exercise of basic rights. This was a substantial factor in *Heilberg* v. *Fixa,* 236 F.Supp. 405, 409 (N.D.Cal. 1965) and *Lamont* v. *Postmaster General,* 229 F.Supp. 913, 921 (S.D.N.Y. 1965) (dissenting opinion). While those cases were pending on appeal to this Court, the government de-

liberately mooted the question by destroying the offending records, *Lamont* v. *Postmaster General,* 381 U.S. at 303. Even without permanent records, this Court noted that there remained an impermissible deterrent: "[A]ny addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda'." 381 U.S. at 307.

If the active disseminator of political material is protected by a right to anonymity, *Talley* v. *California,* 362 U.S. 60 (1960); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *id.,* 290 F.Supp. 244 (E.D.N.Y. 1968), *prob. juris. noted,* 393 U.S. 818; cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958), the passive recipient must have equal, if not greater rights.

(d) *Burden of proof.* The Regulations, as administered, contain a further abridgment of free speech: The burden of proof that the publications are gifts has been cast upon the addressee. Proof of a negative—nonpayment—is classically fraught with problems. To impose such a burden in the area of free speech and press is intolerable. The issue is compounded by the fact that payment, if made, would itself be a criminal act, in violation of 31 C.F.R. §500.201 (a). Thus, as a condition to exercising preferred constitutional rights, the citizen must not only disclaim the commission of a crime (on a form prominently noting the criminal penalties of a false statement under 18 U.S.C. §1001), but he is then put to the burden of proving his innocence. It is doubtful that such a requirement could be imposed as a condition to the exercise of any right or privilege. Where the right is that of speech, the condition must fall, *Speiser* v. *Randall,* 357 U.S. 513 (1958).

4. *The Right to Pay for Publications Is Guaranteed by the First Amendment.*

Petitioner Aid Committee sought a declaration that its right to pay the purchase price of publications could not be restricted by the Regulations. The courts below did not discuss this claim, apparently assuming that by upholding the requirement that licenses be obtained for gratis shipments it was unnecessary to consider the problem of payment. The two situations, however, do not necessarily have that interdependence. Even if a licensing requirement is held to be proper, there remains the question of the standards by which licenses are to be issued.

It is self-evident that in many areas, the exercise of First Amendment rights involves a commercial transaction. The right to pay the price of a publication is crucial to the underlying right to be informed. Only a small portion of the dissemination of opinion and ideas is effected by gratis distribution. On the contrary, most of the media for such expression are commercial ventures. Book, newspaper and magazine publishers have as their primary purpose the making of profit. But this does not detract from the First Amendment rights which are thereby exercised and which unquestionably merit the full protection afforded by the Constitution, *Thomas* v. *Collins,* 323 U.S. 516, 531 (1945).

Even if regulation of commerce as such with a country subject to the Regulations be proper, restrictions must fall where they interfere with free speech and press, just as the power to tax, certainly one of the broadest of governmental powers, may not be used to abridge the right to publish. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

The payment for publications might indeed give some economic benefit to the governments of the proscribed countries, but that benefit is patently trifling. The Regulations acknowledge that purchase of publications from North Vietnam, China and North Korea by universities, libraries, research and scientific institutions is consonant with national policy, 31 C.F.R. §500.204 Appendix item (108). The rights of the citizen, however, are certainly as great as those of the learned institutions. It was for the citizen and his role in the democratic process that the bill of rights was enacted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

HENRY WINESTINE
430 Park Avenue
New York, N. Y. 10022
Attorney for Petitioners

OSMOND K. FRAENKEL
120 Broadway
New York, N. Y.

MELVIN L. WULF
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y.

Of Counsel

February 1969